No. 14-275

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In The Supreme Court of the United States

MARVIN D. HORNE, et al.,

Petitioners,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* INSTITUTE FOR JUSTICE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*

The undersigned *amicus curiae* files this brief in support of the Petitioners.[1]

The Institute for Justice is a nonprofit, public-interest law center committed to defending the essential foundations of a free society through securing greater protection for individual liberty and restoring constitutional limits on the power of Government. Central to the mission of the Institute is strengthening the ability of individuals to control and transfer property and demonstrating that property rights are inextricably connected to other civil rights. The Institute also believes that constitutional review always requires consideration of current realities. When the factual premises for a law no longer exist due to the passage of time, a law can become unconstitutional, even if it may have been constitutional under the factual circumstances of the world when passed long ago. The Institute is therefore interested in this case because it presents an unusual scenario: An attempt by the Government to confiscate property based on a

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[1] Counsel for the *amicus curiae* authored this brief alone and no other person or entity other than the *amicus curiae*, its members or counsel have made a monetary contribution to the preparation or submission of this brief. The parties have jointly given their consent to the filing of *amicus curiae* briefs and have filed their letters of consent with the Court. Counsel for the *amicus curiae* timely notified counsel for the parties that we intended to file this brief.

regulatory scheme whose factual premises are decades out of date.

SUMMARY OF ARGUMENT

When this case was here in 2013, Justice Kagan commented at oral argument that the statute at the heart of the case may be "the world's most outdated law." And so it is.

This is more than an idle observation. In every area of constitutional law, this Court routinely demands that laws be evaluated in light of facts as they exist today. And where the facts that originally justified a law cease to exist, this Court strikes that law down. To be constitutional, a law must have more behind it than the Government's disinclination to update its rules in order to match reality.

This basic premise of constitutional law – the idea that a law enforced today must be relevant today – is central to this case. The statute underlying the raisin marketing order here is a vestige of the laws enacted during the first 100 days of President Roosevelt's New Deal. It was enacted to deal with a perceived economic crisis in agriculture by achieving what the law called "parity" prices, which it defined as the equivalent of market prices as they existed between 1910 and 1914. The order including raisins under this statute was first adopted at the end of World War II when the country faced a glut of raisins on the market that threatened to collapse the raisin

industry. By any reasonable understanding of reality, though, any such crisis has long passed.

This matters here because this case must be understood in light of the basic Takings Clause principle that the Government may not place conditions on the use of property that are unrelated to any burdens the proposed use would place on the public. And here, there is no credible suggestion that what the Hornes want to do (sell their raisins) would impose any burdens at all. There is no agricultural crisis, and no collapsing raisin industry to be protected. The only problem with allowing the Petitioners here to sell their raisins is that it conflicts with the Government's failure to update its agricultural rules in light of changed circumstances.

Simply put, the Government may well have the authority to keep its raisin regulations unchanged and to try to maintain a pre-World War I agricultural market. But it cannot maintain such an obsolete law without paying for the property confiscations this irrational policy requires, and it cannot insist that the costs of its intransigence be born entirely by the property owners in this case. The judgment of the court of appeals should therefore be reversed.

ARGUMENT

I. IT IS WELL SETTLED THAT A LAW MAY BECOME UNCONSTITUTIONAL OVER TIME IF ITS FACTUAL PREMISES CEASE TO EXIST.

This Court has long recognized that a challenged law – even if constitutional when enacted long ago – can become unconstitutional in application now if the passage of time has deprived the statute of its factual premises. This is common sense. The Constitution protects our rights in the real world today, and the Government must be able to justify its enforcement of a statute or regulation in light of the circumstances of the world as they are today. Thus, the constitutionality of a law always depends in part on whether its factual premises still exist, and this question has particular salience where, as here, a challenged law was passed in response to a perceived crisis that transpired eighty years ago and aspires to recreate the world as it existed just before the outbreak of the first world war.

It bears emphasizing that the changed-circumstances doctrine is not a rule about how the Constitution itself changes, a rule about how courts ought to strike down unpopular laws when public sentiment turns, or a rule allowing courts to institute their own social and economic policies. The meaning of the Constitution remains the same, public sentiment is irrelevant, and courts may not substitute their preferences for those of the elected branches. Instead, taking changed circumstances into account

simply ensures that when Government officials curtail someone's liberty *today*, they do so for reasons that are constitutional in the real world *today*, not merely for reasons that were constitutional as the world was generations ago.

This doctrine of changed circumstances applies across the full breadth of constitutional law. In the First Amendment context, for example, in *McCutcheon v. FEC*, the Court refused to evaluate the rationality of aggregate limits on campaign contributions in light of the outdated facts that had been presented when it originally upheld those limits in 1976; it instead demanded evidence about the *current* state of the world. 134 S. Ct. 1434, 1456 (2014); *see also Edwards v. District of Columbia*, 755 F.3d 996, 1004 (D.C. Cir. 2014) (rejecting the Government's reliance on a 1927 *Washington Post* article because "[r]eliance on decades-old evidence says nothing of the present state of affairs").

The Court recently invoked changed circumstances to invalidate a portion of the Voting Rights Act of 1965. In *Shelby County v. Holder*, the Court invalidated measures that certain jurisdictions were required to implement to guarantee ballot access because those measures were predicated on "decades-old data and eradicated practices." 133 S. Ct. 2612, 2617 (2013); *see also Kirkpatrick v. Preisler*, 394 U.S. 526, 535-36 (1968) (rejecting old voting district map because changes in transportation and communications had rendered it obsolete in terms of promoting equal representation); *Karcher v. Daggett*, 462 U.S.

725, 733 (1983) (holding redistricting not in good faith because modern technology had negated New Jersey's traditional justifications for not ensuring equal representation).

The Court has struck down obsolete laws that burden interstate commerce. For example, the Court found in *Granholm v. Heald* that states' "health and safety" justifications for bans on direct shipment of wine by out-of-state wineries have been made obsolete by advances in technology that have allowed state regulatory bodies to monitor out-of-state wineries cheaply, easily, and efficiently. 544 U.S. 460, 492 (2005) (striking down state laws burdening or prohibiting direct shipment of wine from out-of-state wineries); *see also Kassel v. Consol. Freightways Corp. of Delaware*, 450 U.S. 662, 672 (1981) (striking down truck-length statute because obsolete rules "are of limited relevance on modern interstate highways"); *Am. Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266, 301-02 (1987) (O'Connor, J., dissenting) ("Significantly changed circumstances can make an older rule, defensible when formulated, inappropriate, and we have reconsidered cases in the dormant Commerce Clause area before.").

This Court has also long recognized that the changed-circumstances doctrine applies in contexts where judicial deference is thought to be at its maximum. For example, the Court held in the seminal rational-basis decision *United States v. Carolene Products* that a plaintiff can overcome the presumption of constitutionality by proving that the factual premises

for a law are no longer true, and therefore, that the enforcement of the obsolete law today would be irrational. 304 U.S. 144, 153 (1938) ("[T]he constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist."). The statute at issue in *Carolene Products* was eventually invalidated in 1972 on changed-circumstances grounds. *Milnot Co. v. Richardson*, 350 F. Supp. 221, 225 (S.D. Ill. 1972).

II. THE EXACTIONS ANALYSIS MUST BEGIN WITH RECOGNIZING HOW CIRCUMSTANCES HAVE CHANGED SINCE CONGRESS ENACTED THE STATUTE AT ISSUE TO COMBAT THE GREAT DEPRESSION BY TRYING TO RESTORE THE PRE-WORLD WAR I STATUS QUO.

As in other constitutional contexts, the exactions analysis must take changed factual circumstances into account. The factual premises of the Agricultural Marketing Agreement Act of 1937 ("AMAA") are not in dispute. The Great Depression caused widespread economic upheaval and dislocation. The AMAA is a relic from a bygone era, enacted in 1937 as a direct descendant of one of President Roosevelt's New Deal programs, created in reaction to market turmoil that had occurred during the Great Depression, out of a desire to recreate an agricultural market that existed during the farm economy era of 1910 to 1914. Those days are long gone, and today's global, industrialized

agricultural economy is a very different place from 1914.

The marketing order and agreement provisions of the AMAA first arose as part of President Roosevelt's Agricultural Adjustment Act. Act of May 12, 1933, ch. 25, 48 Stat. 31, *codified as amended at* 7 U.S.C. §§ 601-605, 607-623 (1994).

The overarching goal of the AMAA was to rectify the economic turmoil of the Great Depression in the mid-1930s by restoring the pre-WWI pricing structure by legislative command. The statute sought to accomplish this in two ways: (1) achieve and maintain "parity prices" for agricultural commodities; and (2) establish and maintain "orderly marketing conditions for agricultural commodities." 7 U.S.C. § 602(1); *see also Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 346 (1984). "Parity price" is defined in the statute as the product of an "adjusted base price" and a "parity index," both of which are based on "the general level of prices . . during the period January 1910 to December 1914, inclusive."[2] 7 U.S.C. § 1301(a)(1)(A), (B). The proposed "orderly marketing conditions" were meant to prevent "unreasonable fluctuations in supplies and prices" similar to what had occurred during

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[2] Although designed to "protect the interest of the consumer" 7 U.S.C. § 602(2), prices under this system have rarely achieved parity. Daniel Bensing, *The Promulgation and Implementation of Federal Marketing Orders Regulating Fruit and Vegetable Crops Under the Agricultural Marketing Agreement Act of 1937*, 5 San Joaquin Agric. L. Rev. 3, 5 n.10 (1996).

the Great Depression, just prior to the enactment of the AMAA. 7 U.S.C. § 602(4); *see also Horne v. U.S. Dep't of Agric.*, 133 S. Ct. 2053, 2056-57 (2013). President Roosevelt and Congress looked to the most recent period of relative economic stability – the years immediately preceding World War I – and sought to use the AMAA to recreate that pre-war status quo.

The California Raisin Marketing Order, 7 C.F.R. § 989.54 (the "CRMO"), is the Department of Agriculture's effort to implement the AMAA for raisins. 7 C.F.R. § 989.55 (providing that recommendations from the California Raisin Administrative Committee, 7 C.F.R. §§ 989.26-39, about the annual "free" and "reserve" percentages for raisins acquired by handlers are subject to the approval of the Secretary of Agriculture, who is to ensure that the percentages "will tend to effectuate the declared policy of the [AMAA]").

To put the challenged regulations in the context of the changed-circumstances doctrine, the two factual premises of the AMAA and CRMO have long ceased to exist. There is no possible debate that the Great Depression of the 1930s is still underway. Nor is it rationally possible to argue that the federal Government in 2015 needs to keep fighting the Great Depression of the 1930s by imposing the pricing structure of the pre-WWI era on the raisin market. Indeed, just to state what the Government is trying to do – address the Great Depression by trying to recreate a century-old status quo – is to demonstrate the irrationality of what the Government is trying to do.

Significantly, this is not a garden-variety policy argument. Instead, it is a *constitutional* argument that the factual premises of the challenged law have so utterly disappeared that enforcing the law today is arbitrary. The flagrant arbitrariness of enforcing the raisin marketing orders in 2015 is evident in the fact that similar marketing orders governing other agricultural products have been terminated over the past 30 years without any detrimental effects. *See* Dennis M. Gaab, *The California-Arizona Citrus Marketing Orders: Examples of Failed Attempts to Regulate Markets For Agricultural Commodities*, 5 San Joaquin Agric. L. Rev. 119, 125-26 (1995) (discussing the abandonment of several AMAA marketing orders in the 1980s and 1990s, including those for grapefruits, tart cherries, plums, navel and Valencia oranges, and lemons).[3] Moreover, the AMAA proceeds from premises about the basic structure of the agricultural market that are no longer true: In practice, the AMAA functions primarily by placing regulatory restrictions on "handlers," *i.e.*, packing houses and processing plants, for the benefit of "growers." But, as evidenced by the Petitioners in this case, it is not only unclear that "growers" require protection from "handlers" in the modern market; it is unclear that "growers" and "handlers" are even coherent categories in today's global,

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[3] Similarly, this Court need not address whether the AMAA was a constitutional response to the perceived crisis when it was passed in the 1930s because no reasonable person believes that "crisis" continues to persist today.

industry-heavy agricultural economy. *See* Daniel Bensing, *The Promulgation and Implementation of Federal Marketing Orders Regulating Fruit and Vegetable Crops Under the Agricultural Marketing Agreement Act of 1937*, 5 San Joaquin Agric. L. Rev. 3, 8 (1996) ("While there may often be some overlap and community of interest between handlers and growers, the AMAA is the product of an era when small, independent growers were frequently left to the mercy of large handlers who could benefit from their market power and position.").

This Court cannot be willfully blind to the drastic change in circumstances here any more than the Court could be willfully blind to the fact in *Shelby County*, for example, that the world of 2013, however imperfect in terms of race relations, was not the world of 1965. Just as the Constitution dictates that the enforcement of the Voting Rights Act must reflect those changes over a generation, so too does the Constitution dictate that the enforcement of much older agricultural laws must reflect changed circumstances.

III. IN 2015, THE GOVERNMENT HAS NO PLAUSIBLE REASON FOR REQUIRING THE HORNES TO TURN OVER A HUGE FRACTION OF THEIR RAISIN HARVEST WITHOUT COMPENSATION.

The changed-circumstances doctrine is relevant here because the fundamental question in this case – like in any Takings Clause case – is *why* the

Government is seizing the property in question. The preceding discussion establishes that the underlying seizure in this case is based on an agricultural crisis that has almost passed from living memory, and that the only reason the Government is imposing the burdens in question is that the Hornes (and other raisin farmers) insist on growing and selling raisins in 2015 instead of doing so in 1915. That simple fact is fatal to the Government's case.

A core purpose of the Takings Clause is to prevent "[g]overnment from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960); *see also First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles*, 482 U.S. 304, 321 (1987) (explaining that the Just Compensation Clause is one of many constitutional provisions "designed to limit the flexibility and freedom of governmental authorities"). This means, among other things, that the Government may not "'by *ipse dixit* transform private property into public property without compensation. . '" *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1031 (1992) (quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980)). In other words, Government may act to prevent *harmful* uses of property – such as common-law nuisances – but it may not (without compensation) simply seize property that, for policy reasons, it thinks it can put to better use. *Id.*

The simplest illustration of that universal principle is this Court's longstanding exactions doctrine,

which holds that the Government may not impose conditions on the use of property that are unrelated to any burdens the proposed use would place on the Government (or the public). *See Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

That doctrine has longstanding roots in federal law. In the classic case of *Parks v. Watson*, for example, the owner of property in Oregon sought to construct apartment units. 716 F.2d 646, 649-50 (9th Cir. 1983). One problem was that streets had been planned theoretically across the land, but were never built. In land use parlance, they were merely "paper streets," – that is, they had existence only on paper, not in reality. Although the city was generally amenable, it concluded that it would only vacate the paper streets if the landowner gave the city property containing valuable geothermal wells. The property owner balked, sued, and won. *See id.* And the owner won because the city's demand for geothermal property was unrelated to the city's proffered benefit of allowing the apartments to be constructed. *Id.* at 652.

This Court built on *Parks* in its landmark *Nollan* decision (considered in tandem with *First English* and decided two weeks later). *See Nollan*, 483 U.S. at 839 (noting that its conclusion is "consistent" with *Parks*). There, in exchange for a permit to replace a rundown beach cottage with a modern home, the California Coastal Commission demanded an easement for public passage across the privately owned sand between the home and the ocean. *See id.* at 827-30. The Supreme Court struck down the condition as an unlawful taking without compensation,

likening it to "an out-and-out plan of extortion." *Id.* at 837. The test there applied was that such a condition is unconstitutional unless the development caused a public problem that the condition would resolve, and unless the condition served the same purpose as denying the permit completely. *See id.*

In its later exactions jurisprudence, this Court continued to emphasize the need to evaluate the kind and degree of harm that the property owner was supposedly causing in order to determine if the Government could demand exactions without compensation. In *Dolan v. City of Tigard*, the Court augmented its *Nollan* holding – that an exaction had to have a substantial nexus between the property exacted from the property owner and the burden the proposed project would place on the community) – adding that there needed to be "rough proportionality" between the burden the project would place on the community and the *quid pro quo* demanded by the Government in exchange for a development permit. 512 U.S. 374, 398 (1994). In so doing, the Court refused to simply defer to the city's decision. Instead, it placed the burden on the city to justify its action. *See id.* at 391 n.8.

Here, as in *Dolan*, the burden should be on the Government to show how the Hornes' actions of handling and selling raisins place a burden on the community and how the exactions imposed by the Government ameliorate that burden in a proportional way. The problem is that the "burden" supposedly imposed by the Hornes is no burden on anyone, much less a burden on the raisin-consuming or

raisin-producing public. The Hornes have simply failed to conform their agricultural production to the long-obsolete standards of the 1914 market. The nation has changed over the course of 100 years, however, and the Hornes should not have to bear the financial burden of the Government's refusal to adjust the law in the face of that change.

If the Government insists on conditioning the Hornes' use of their raisin crop on turning over more than a third of that crop to the Government's discretionary use, then the Government must be able to explain how this condition relates to or helps ameliorate the danger of allowing the Hornes to sell their crop. *Cf. Stephenson v. Binford*, 287 U.S. 251, 275 (1932) (rejecting Government condition where "the use of the highways furnished a purely unrelated occasion for imposing the unconstitutional condition"). And the Government cannot do so.

Perhaps in 1937, the Government would have defended the takings at issue here by claiming that allowing the free-market sale of raisins would result in the catastrophic destruction of the entire agricultural economy. But however that argument would have fared in 1937, it cannot be seriously advanced now. This is doubly true in light of the fact that the argument today also would need to be that the free-market sale of raisins – but not grapefruits, tart cherries, plums, or other agricultural products free from AMAA marketing orders – would lead to this kind of catastrophe. That argument is simply unavailable here. Instead, there is only the Government's refusal

to change its laws in light of the modern agricultural industry – and its insistence that the only people who should bear the cost of that refusal are the Hornes and other farmers like them.

CONCLUSION

There comes a time to say "goodbye" to regulations so antiquated that they have become constitutionally intolerable. The Court has two such relics before it today in the CRMO and the AMAA. To the extent they ever had validity, their time has passed.

Respectfully submitted,

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